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In The

Supreme Court of the United States

October Term, 1922.

No. 117
(29,131)

GEORGE CARROLL, and
JOHN KIBO,
Plaintiffs in Error,

v.

THE UNITED STATES,
Defendant in Error.

BRIEF ON BEHALF OF THE PLAINTIFFS IN ERROR.

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In The

Supreme Court of the United States

October Term, 1922.

No. 581.
(29,131)

GEORGE CARROLL, and
JOHN KIRO,
Plaintiffs in Error,

v.

THE UNITED STATES,
Defendant in Error.

BRIEF ON BEHALF OF THE PLAINTIFFS IN ERROR.

STATEMENT OF THE CASE.

(The references by number contained in this brief refer to the page of the printed record unless the context indicates the contrary.)

Plaintiffs in error were convicted in the District Court for the Western District of Michigan for transportation and possession of liquor in violation of the National Prohibition Enforcement Act. Writ of error was issued direct to this court from the District Court.

On the 15th day of December, 1921, plaintiffs in error were driving in an Oldsmobile roadster automobile (3, 5)

owned by George Carroll, one of the plaintiffs in error, on the public highway (1). They were met by prohibition officers (1) who passed them and later came up from behind and stopped them (4, 6). The officers were not on the lookout for plaintiffs in error (1) and had no reason to believe that they were transporting liquor (2, 4, 5). The officers searched each of plaintiffs in error (4, 5) and also the car (2, 4, 5). At first the officers found nothing and were about to release plaintiffs in error (4, 5) but later found 73 quart bottles of liquor (3, 5) concealed in the cushions of the car (2, 4, 5). The bottles were found by tearing the back cushion of the car (4, 5). The plaintiffs in error were then arrested and the liquor and car seized by the federal officers (1, 4, 5). No warrant was issued until the following day (1, 4, 5).

The plaintiffs in error filed a petition with the United States Commissioner for a return of the property seized and for a dismissal of the case upon the ground that the evidence was obtained through an illegal search, which motion was denied (1, 2).

Plaintiffs in error were jointly indicted on June 10, 1922, for transportation (2) and possession (3) of liquor in violation of the National Prohibition Act.

On June 13, 1922, plaintiffs in error filed separate sworn petitions setting out the facts substantially as above for a return of the property seized and asking that the search and seizure be declared illegal because in violation of their rights under the Fourth and Fifth Amendments of the Constitution of the United States (3-6). No counter affidavits were filed. The petitions or motions were heard by the court on June 19, 1922, and were denied after argument (6). The court delivered an oral opinion which is not contained in the record for the reason that there was no stenographer present.

The case was tried June 20, 1922 (7), and the motions renewed, denied by the court and an exception noted (7).

The plaintiffs in error were not sworn and no testimony was offered in their behalf. The testimony showed that plaintiffs in error were stopped by three federal prohibition agents, Cronenwett, Scully and Thayer and Walter A. Petersen, Drug and Liquor Inspector of the State Department of Public Safety (7, 10). The substantial facts contained in the plaintiffs' in error petitions are not contradicted. The officers were out patrolling the road (7, 10) and had no knowledge or information that the car was coming through (8, 13). They admit they had no warrant at the time (8, 13). The officers first passed the Carroll car, and then turned about and overtook and stopped plaintiffs in error (8, 10, 12). Cronenwett admits he had a gun in his pocket and denies that he presented it (11). The officers searched the car in their own way (13) raised up the back part of the roadster and also the cushion and found nothing (12). Cronenwett testified that he then struck at the lazyback of the seat and it was hard (12); practically solid (13). Petersen said he thought the bottles could be felt through the seat but is not positive (10). Cronenwett testified that he started to open the seat up and did tear the cushion (12). He further said that Carroll tried to bribe him to let him go (12); Scully so testified (9). The officers took possession of the liquor (13) and arrested Carroll and Kiro (13, 9). The liquor was taken to Grand Rapids by Mr. Petersen and turned over to the deputy marshal (10). It was produced at the trial and admitted in evidence over objection of plaintiffs in error and an exception noted (14). No question was raised as to the identity of the liquor and it was conceded to be intoxicating.

Cronenwett testified that he first met the plaintiffs in error September 29, 1921; that they came to Scully's apartment in company with a man called Kruska (11); that Cronenwett said he was working for a furniture company and wanted three cases of whisky; that a price was agreed upon and the three went away to get the liquor; that they came back and Kruska said they could not get

it that night but would deliver next morning at ten o'clock; that they did not deliver it next day (11). Witness Scully also testified to some of these facts (8, 9). Both say that plaintiffs in error had the same car with them on this evening that they had on December 15, 1921, the date of the seizure and arrest (9, 11, 12). These two witnesses also testified that they saw the plaintiffs in error driving toward Detroit on October 6th in the same car and that they followed them to East Lansing (8, 12).

The case was submitted to the jury without argument and defendants found guilty upon both counts and each sentenced to pay a fine of $500.

SPECIFICATION OF ERRORS.

The plaintiffs in error rely on the following assignment of errors, found on page 16 of the record:

> First. That the United States Commissioner erred in overruling the respondents' motion for the return of certain property seized by the federal prohibition agents.
>
> Second. That the trial court erred in denying the motion of respondents and plaintiffs in error for the return of certain property seized by the federal prohibition agents.
>
> Third. That the trial court erred in admitting in evidence certain property seized by the federal prohibition agents and information obtained in connection with said seizure.
>
> Fourth. That the trial court erred in holding that certain property seized was not obtained and put in evidence in violation of the rights of respondents and plaintiffs in error, under the Fourth and Fifth Amendments to the Constitution of the United States.

Fifth. That the trial court erred in admitting in evidence certain liquor, Exhibits A and B, over respondents' objection that the same was obtained and used in evidence in violation of the rights of respondents and plaintiffs in error under the Fourth and Fifth Amendments to the Constitution of the United States.

Sixth. That the trial court erred in admitting in evidence, over respondents' objection, certain testimony of Arthur Scully, as to conversation alleged to have taken place with Mr. Cronenwett and respondents in September, 1921.

ARGUMENT.

I. This Court Has Complete Jurisdiction Under the Writ of Error Taken Direct From the District Court.

Section 238 of the Judicial Code provides:

> "Appeals and writs of error may be taken from the district courts, * * * direct to the Supreme Court in the following cases: * * * in any case that involves the construction or application of the Constitution of the United States; in any case in which the constitutionality of any law of the United States * * * is drawn in question." * * *

The case at bar clearly involves the construction and application of the Fourth and Fifth Amendments of the Constitution of the United States. It is the contention of plaintiffs in error that the evidence upon which the government case is based was obtained by means of an illegal and unconstitutional search and seizure and was used in violation of the constitutional rights of plaintiffs in error. This contention does directly involve the construction and application of the Constitution of the United States.

> *Motes v. United States, 178 U. S., 458; 20 Sup. Ct., 993, 996.*

The *Motes case* was one in which there was a writ of error taken out from the circuit court direct to the Supreme Court. One of the controversies in the case was whether the reading of the statement taken on preliminary

examination of a witness absent at the trial violated the Sixth Amendment as not giving the accused the right to be confronted with witnesses. This court speaking through Mr. Justice Gray held that the writ of error was properly issued direct to the Supreme Court, saying:

> "The present case does involve the construction and application of the Constitution of the United States. It is necessary to determine whether the admission of certain testimony was not an infringement of rights secured to the accused by the Sixth Amendment of the Constitution declaring that in all criminal prosecutions the accused shall enjoy the right * * * to be confronted with the witnesses against him."

The instant cause is an exact parallel to the *Motes case*, except that the Fourth and Fifth Amendments are here involved instead of the Sixth Amendment. The holding in the *Motes case* has never been questioned. In the following cases this court entertained a writ of error direct from the district court where it was claimed that defendants' rights under the Fourth and Fifth Amendments were violated by the search and seizures made by government officers and evidence obtained thereby introduced in evidence.

Weeks v. United States, 232 U. S., 383; 34 Sup. Ct., 341.

Silverthorne Lumber Co. v. United States, 251 U. S., 385; 40 Sup. Ct., 182.

Amos v. United States, 255 U. S., 313; 41 Sup. Ct., 266.

In addition, the constitutionality of a law of the United States is drawn in question.

Section 26 of the Federal Prohibition Enforcement Law (Barnes Federal Code, 1923, Sec. 8352-a), provides:

> "When the commissioner, his assistants, inspectors, or any officer of the law shall discover any

> person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle * * * and shall arrest any person in charge thereof." * * *

If the foregoing passage is construed as meaning that an officer may search any and all vehicles running or standing on a public highway or private place and if liquor is found, seize the same and the vehicle and arrest the occupants, then we surely contend that the act is unconstitutional and in violation of the Fourth and Fifth Amendments.

There are then two distinct grounds upon which the writ of error may be taken to this court direct from the district court, viz: because of appellant's claim that their constitutional rights have been invaded before and at the trial and because the act under which the federal officers evidently derived their authority is unconstitutional. In fact it is only fair to say that the appellant's objections to the judgment of the court are practically all of a constitutional nature.

However, all questions raised in the assignment of errors are properly before this court. In *Chappell v. United States, 160 U. S., 499, 509,* the court said:

> "This court * * * has appellate jurisdiction of this case as one in which the constitutionality of a law of the United States is drawn in question; and, having acquired jurisdiction under the clause, has the power to dispose not merely of the constitutional question, but of the entire case, including all questions, whether of jurisdiction or of merits" (citing cases).

II. The Arrest of the Plaintiffs in Error in This Case Was Illegal.

In this case the record shows that the search of plaintiffs in error preceded their arrest. The ordinary course of events are first, a warrant is issued for arrest, second, the arrest is effected, third, the accused and his immediate belongings may then be searched. We do not question the well established principle that a person legally arrested may be searched. However, in the instant cause the exact opposite order of procedure was observed. First, plaintiffs in error were stopped on the public highway and, they and their car were searched; second, the liquor and car were seized; third, plaintiffs in error were arrested; fourth (and most irregular of all) a warrant was issued for their arrest on the next day. Naturally in this case the legality of the arrest and of the search and seizure are to a large degree questions which dovetail into each other. However we deem it helpful to consider the questions of arrest on one hand and search and seizure on the other, separately as far as possible. The present division of the brief is devoted principally to the subject of the legality of the arrest of plaintiffs in error.

The general rule is that an officer cannot arrest a person legally without a warrant. To this rule there are only two exceptions. See authorities *infra.*

(1) An officer may arrest without a warrant where a felony is committed or attempted in the officer's presence or where the officer has reasonable grounds to suspect that one has committed a felony.

(2) An officer may arrest without a warrant for a misdemeanor provided first the offense is committed in his presence and second the offense amounts to a breach of the peace.

State v. Lutz, 85 W. Va., 330; 101 S. E., 434.

A. The Officers Had No Reasonable Grounds to Suspect That a Felony Was Being Committed.

Even if the officers had reasonable grounds for suspicion that defendants had committed the very offense, of which they were convicted, that offense did not constitute a felony.

Section 29 of the National Prohibition Enforcement Act after setting forth the penalty for the manufacture and sale of liquor provides:

> "Any person violating the provisions of any permit, or who makes any false record, report, or affidavit required by this title, or violates any of the provisions of this title, for which offense a special penalty is not prescribed, shall be fined for a first offense not more than $500; for a second offense not less than $100 nor more than $1,000, or be imprisoned not more than ninety days; for any subsequent offense shall be fined no less than $500 and be imprisoned not less than three months nor more than two years. It shall be the duty of the prosecuting officer to ascertain whether the defendant has been previously convicted and to plead the prior conviction in the affidavit, information, or indictment." * * *

No prior convictions of plaintiffs in error were pleaded in the indictment or shown at the trial or suggested in any other manner. The amount of the fines, viz: $500 each shows that these convictions were not regarded as third offenses.

Section 335 of the Criminal Code (35 Stat., 1152, Barnes Federal Code, Sec. 10,038), provides:

> "All offenses which may be punished by death, or imprisonment for a term exceeding one year, shall

be deemed felonies. All other offenses shall be deemed misdemeanors."

It is perfectly clear therefore that as the maximum penalty for the first offense does not involve any imprisonment at all but only a fine, the offense is only a misdemeanor and not a felony. There would be no felony unless there were two previous convictions. This position has been maintained in the following cases, involving first offenses under the National Prohibition Act.

Cleveland v. Mattingly, 287 Fed., 948 (Ct. of App. D. of C.).
United States v. Illig, 288 Fed., 939 (D. C. W. D. of Pa.).
Snyder v. United States, 285 Fed., 1 (C. C. A., 4th Cir.).

It is clear that no felony was committed. It is also clear that there was no reasonable ground for belief that the plaintiffs in error had committed any greater crime than that of which they were convicted. There is absolutely nothing to indicate that the officers in any way suspected that plaintiffs in error were committing any offense greater than a misdemeanor.

B. Indeed it is Also Clear That There Were No Reasonable Grounds to Even Suspect That Even a Misdemeanor Had Been Committed.

There was nothing about the appearance of the car to indicate that it carried liquor. The liquor was only found after a thorough search and destruction of the cushion (4, 5, 12). Two of the officers testified that they had seen the car twice before but there was no evidence that it had ever transported liquor before. The officers had never purchased liquor from plaintiffs in error although they testified that they had tried and had not been successful (8, 9, 11). The officers admit that they had no informa-

tion that this car was coming through at this particular time (8, 13) and that they were merely patrolling the road (7).

The following passage occurs in the report of the United States Commissioner, and is nowhere denied:

> "The witness (Arthur Q. Scully, one of the arresting prohibition agents) stated that when the respondents were met upon the highway by the prohibition officers, the prohibition officers were not on the lookout for the respondents and had no reason to believe that the respondents were transporting liquor" (1, 2).

From their own admission the officers had no reason to believe that the plaintiffs in error were committing a felony or a misdemeanor. The search must therefor have been based upon a mere capricious venture.

C. No Misdemeanor Was Committed In the Officers' Presence and Hence the Officers Could Not Legally Arrest Without a Warrant.

In *Kurtz v. Moffitt, 115 U. S., 487, 6 Sup. Ct., 148,* Mr. Justice Gray said, speaking for the court:

> "By the common law of England, neither a civil officer nor a private citizen had the right, without a warrant, to make an arrest for a crime not committed in his presence, except in the case of a felony, and then only for the purpose of bringing the offender before a civil magistrate."

It is true that the plaintiffs in error were seen by the arresting officers. It is also true that at the time they were so seen, they were committing a misdemeanor. But where the fact of the commission of the offense is only dis-

coverable by means of a search, the offense is not in legal contemplation committed in the presence of an officer.

Snyder v. United States, 285 Fed., 1 (C. C. A., 4th Cir.).
Pickett v. State, 99 Ga., 12; 25 S. E., 609; 59 Am. St. Rep., 226.
State v. Lutz, 85 W. Va., 330; 101 S. E., 434.
Roberson v. State, 43 Fla., 156; 52 L. R. A., 751; 29 So., 535.

The case of *Snyder v. United States, supra,* is one in which a federal prohibition agent observed that the defendant's overcoat pocket was bulging and the neck of a bottle protruding therefrom. The officer lifted the bottle half way out of his pocket and being convinced that it contained whisky, arrested defendant and searched him and found three similar bottles all containing whisky. Pending trial defendant moved to have the evidence suppressed upon the ground that it was obtained in violation of his constitutional rights. This motion was denied by the district court. In reversing the case the Circuit Court of Appeals said:

> "What we are therefore called on to determine is whether evidence of a misdemeanor obtained under the circumstances hereinabove enumerated is, where seasonable motion for its suppression has been made, admissible at the trial.
>
> That an officer may not make an arrest for a misdemeanor not committed in his presence, without a warrant, has been so frequently decided as not to require citation of authority. It is equally fundamental that a citizen may not be arrested on suspicion of having committed a misdemeanor and have his person searched by force, without a warrant of arrest. If, therefore, the arresting officer in this case had no other justification for the arrest than the mere suspicion that a bottle, only the neck of which he could see protruding from the pocket of defend-

ant's coat, contained intoxicating liquor, then it would seem to follow without much question that the arrest and search, without first having secured a warrant, were illegal. And that his only justification was his suspicion is admitted by the evidence of the arresting officer himself. If the bottle had been empty or if it had contained any one of a dozen innoxious liquids, the act of the officer would, admittedly, have been an unlawful invasion of the personal liberty of the defendant. That it happened in this instance to contain whisky, we think, neither justifies the assault nor condemns the principle which makes such an act unlawful."

In *Pickett v. State, 99 Ga., 12; 25 S. E., 608; 59 Am. St. Rep., 226,* the defendant claimed that he was justified in resisting arrest and assaulting an officer. It appeared that the officer insisted on searching defendant without a warrant for concealed weapons. The officer claimed he was told by some person that defendant was armed. The court said speaking through Mr. Justice Lumpkin:

"While, under Section 4723 of the Code, an officer may, without a warrant, make an arrest for an offense committed in his presence, he has no authority, upon bare suspicion or upon mere information derived from others, to arrest a citizen and search his person in order to ascertain whether or not he is carrying a concealed weapon in violation of law. The constitution of this state expressly declares in the bill of rights that: 'The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated': Code, Section 5008. If any search is unreasonable and obnoxious to our fundamental law, it is one of the kind with which we are now dealing. Even if the person arrested did in fact have a pistol concealed about his person, the fact not being discoverable without a search, the offense of thus carrying it was not, in legal con-

> templation, committed in the presence of the officer, and the latter violated a sacred constitutional right of the citizen in assuming to exercise a pretended authority to search his person in order to expose his suspected criminality."

We submit then that upon the holdings of the foregoing cases and upon reason it cannot be said that a misdemeanor was committed in the presence of the officers so as to justify an arrest without a warrant.

Indeed the court in the *Snyder case* went much further than is necessary to go in the instant cause. There the bottle was visible, but in the instant cause there was nothing about the plaintiffs in error or the car which suggested the presence of liquor. The liquor was found in the instant cause only by means of a thorough search and partial destruction of the car.

D. The Offense Does Not Constitute a Breach of the Peace.

It must be remembered that not only does a misdemeanor have to be committed in the presence of the officer but in addition it must be a breach of the peace. *State v. Lutz, 85 W. Va., 330; 101 S. E., 434.* We submit that the offense was not committed in the presence of the officers (Sec. C, *supra*) and furthermore that it was not a breach of the peace. There are therefore at least two reasons why the arrest was illegal in the instant cause.

> "A breach of the peace is an offense well known to the common law. It is a disturbance of public order by an act of violence, or by an act likely to produce violence, or which, by causing consternation and alarm, disturbs the peace and quiet of the community."
>
> *People v. Most, 64 N. E., 175; 171 N. Y., 423; 58 L. R. A., 509.*

It was held in *Yerkes v. Smith, 157 Mich., 557; 122 N. W., 223,* that playing base ball on Sunday though made unlawful did not constitute a breach of the peace. Mr. Justice Hooker said for the court:

> "We have said that the mere playing of a game of base ball upon Sunday is not of itself necessarily a breach of the peace, justifying arrest and indictment. In a sense a game of base ball on Sunday may often be a breach of the peace, perhaps usually is, but it cannot be said that it is necessarily so, and before a summary arrest can be made for a breach of the peace, not only must overt acts be committed in the presence of the officer, but they must be violent and dangerous acts of some sort."

Under the commonly accepted definition of a breach of the peace, we submit that the secret and nonviolent character of the act of plaintiffs in error prevent it from being considered a breach of the peace. Often a certain offense is declared to be a breach of the peace by statute. We find no section of the National Prohibition Enforcement Act which so defines the acts of transportation and possession of liquor. Section 21 declares that any room, vehicle, etc., where liquor is sold, manufactured or kept is a nuisance. This section does not refer to vehicles used for the purpose of transportation only. Moreove it was held in the case of *Danovan v. Jones, 36 N. H., 246,* that an officer had no right without a warrant to arrest a person for the erecting of a nuisance in his presence.

III. The Search and Seizure Were in Violation of the Constitutional Rights of the Plaintiffs in Error.

We do not question the well established principle recognized by way of dictum in *Weeks v. United States, 232 U. S., 383; 34 Sup. Ct., 341,* that an officer may search a person legally arrested to discover and seize the fruits or evidences of the crime. But this principle has no application to the instant cause for two reasons, viz: first the search preceded the arrest (2, 4, 5, 13, 9) and second the arrest being illegal (see Division II of this brief) gave no more right to search than if there had been no arrest at all.

Pickett v. State, 99 Ga., 12; 25 S. E., 608; 59 Am. St. Rep., 226.
Youman v. State, 189 Ky., 152; 224 S. W., 860.
State v. Wills, 91 W. Va., 659; 114 S. E., 261.

In *State v. Wills, 91 W. Va., 659; 114 S. E., 261,* the conviction of defendant by the trial court for possession of liquor was reversed. Mr. Justice Meredith speaking for the court said:

> "He was doubtless arrested on mere suspicion of having 'moonshine liquor' in his possession; if so, that suspicion turned out to be well founded, but the officer does not say that he even had such suspicion. After his arrest, the officer searched his person and found two bottles of liquor on him, containing about a pint and a half. The officer had no warrant either for his arrest or search. It may be admitted that had he been lawfully arrested for the offense, then his subsequent search would have been lawful. But his arrest was unlawful, as, within the meaning of *State v. Lutz, supra,* there was no such offense being committed by defendant in the officer's presence as authorized the officer to arrest without a warrant. His arrest being unlawful, it necessarily follows that the subsequent search of his person was

unlawful, and the evidence of his offense was unlawfully and illegally obtained. The question then arises whether, on a trial for the offense of having the 'moonshine liquor' in his possession, the liquor or any evidence of the offense, so procured by means of the unlawful search, can be given in evidence by the state over the objection of the defendant. It is not a case of lawful arrest, followed by search, where the accused claims the search unlawful, but one where both arrest and search were alike unlawful.

Counsel for defendant claim that to admit such evidence violates his rights under the Fifth and Sixth Sections of Article 3 of the State Constitution. The Fifth Section provides that:

'No person shall be transported out of, or forced to leave the state for any offense committed within the same; nor shall any person, in any criminal case, be compelled to be a witness against himself.'

Section 6 provides:

'The rights of the citizens to be secure in their houses, persons, papers and effects, against unreasonable searches and seizures, shall not be violated. No warrant shall issue except upon probable cause, supported by oath or affirmation, particularly describing the place to be searched, or the person or thing to be seized.' "

In *Youman v. State, 189 Ky., 152; 224 S. W., 860,* it appeared that the officer had a warrant for defendant's arrest and called at his home. The defendant was not at home but his wife was there. The officer searched the premises and found liquor there. In reversing the case Mr. Chief Justice Carroll said for the court in a well considered opinion:

"In this connection it should further be said that, as the possession of intoxicating liquors for the purpose of sale in violation of the law was a public offense, it is not to be doubted that a search warrant in the manner and form authorized by Sec. 10

of the Constitution might be issued, conferring authority on the officer to search the premises, person, baggage, and personal belongings of an alleged offender, or that evidence that liquor found under such a warrant would be competent, as well as the evidence of the officers describing the place where they found it. *3 R. C. L., 154; Getchell v. Page, 103 Me., 387; 18 L. R. A. (N. S.), 253; 69 Atl., 624; People v. Campbell, 160 Mich., 108; 34 L. R. A. (N. S.), 58; 136 Am. St. Rep., 417; 125 N. W., 42; State v. Mausert, 88 N. J. L., 286; L. R. A., 1916-C, 1014; 95 Atl., 991.*

But no search of the person or personal baggage or personal belongings, or seizure of any articles found thereon or therein, can be made on suspicion or without a search warrant, unless and until the offender is first taken into custody under a warrant of arrest, or his arrest without a warrant is authorized by Sec. 36 of the Criminal Code, providing that an officer may make an arrest without a warrant, * * * 'when a public offense is committed in his presence, or when he had reasonable ground for believing that the person arrested has committed a felony.' "

In *People v. Margelis, 217 Mich., 423; 186 N. W., 488,* the officer asked defendant for liquor. The defendant went upstairs to get it and returning was met at the bottom of the stairs by the officer. It was dark and the officer grabbed him and wrestled a bottle away from him. It was held error to receive the liquor in evidence, the court saying through Mr. Justice Clark:

"Counsel for the people say that there were sufficient reasons of belief to justify an arrest of defendant Margelis without warrant for felony, that what has been related constituted a lawful arrest, and that it was lawful to take from his person the bottle of whisky after his arrest. The infirmity of this is the assuming a lawful arrest. Defendant,

when seized by the officer, was not advised that he was under arrest. There was neither a present intention to arrest nor submission to arrest. The treatment he received was for the sole purpose, the record shows, of securing for the purpose of evidence the whisky supposed to be on his person. It was not an arrest. *4 C. J., 385-387.* It was error to receive in evidence the whisky so obtained."

In *United States v. Myers, 287 Fed., 260 (D. C. W. D. Ky.),* it appeared that a prohibition agent saw the defendant driving his automobile and claimed to have seen indications that the driver was intoxicated and forced him to stop at the point of a pistol. He searched the car and found whisky. In a well considered opinion holding that evidence of the whisky was not admissible in evidence, District Judge Walter Evans, after citing opinions of this court, said page 262:

"We do not, of course, lose sight of the further proposition that if, for example, an officer sees intoxicating liquors being loaded upon an automobile or other vehicle, he can thereupon seize the vehicle and arrest the person who has put the liquor upon it. He does not, under such circumstances, have to extort from the offender any testimony. Other palpable situations might also authorize similar action, such, for example, as plainly seeing the liquor leaking from a vehicle in which it is being transported, such a leak expending itself upon the public highway and the spirits spreading themselves and their odor along the road. No testimony would have to be extorted from the offender in cases like these, as the whole situation in each supposed case is developed by facts plainly shown.

It was under circumstances similar to those last described that Judge Cochran, of the Eastern District of Kentucky held a seizure and arrest to be entirely proper, and there can be no doubt about the perfect accuracy of that decision, though it is by no means

applicable to a case like this, where the only testimony that an offense had been or was being committed was discovered at the point of a pistol and without the consent of the defendant. A mere supposition that the driver of the automobile was possibly intoxicated in no way brought this case within the principle of the one so decided, nor justified depriving the defendant of his constitutional rights.

His motion for an instructed verdict of not guilty is therefore sustained, and the jury will be directed accordingly."

The Fourth Amendment of the Constitution of the United States provides:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

The history of this Amendment has been admirably and particularly set forth in the case of *Boyd v. United States, 116 U. S., 616; 6 Sup. Ct., 524.* It would be idle to here repeat that history. The right to be secure against unreasonable searches and seizures has been dear to the English speaking people. That right has heretofore been carefully protected as a constitutional principle by decisions of this court.

The Fourth Amendment mentions four things which are protected, viz: Persons, houses, papers and effects. The decisions of this court, however, have largely been confined to cases in which the houses of accused have been searched without a warrant and papers of an evidential nature obtained as a result of the search. But the maxim that "a man's home is his castle" does not include the full scope of the Fourth Amendment. It likewise protects the persons,

and effects, wherever they may be, against unreasonable searches and seizures. This is illustrated by the recent case of *Gouled v. United States, 255 U. S., 298; 41 Sup. Ct., 261,* in which this court held that a seizure by stealth in an office without a search warrant was in violation of the Fourth Amendment. The court attached no significance to the fact that papers as distinguished from other property were taken, saying, page 309:

> "There is no special sanctity in papers, as distinguished from other forms of property, to render them immune from search and seizure, if only they fall within the scope of the principles of the cases in which other property may be seized, and if they be adequately described in the affidavit and warrant."

Moreover in the case of *Amos v. United States, 255 U. S., 313; 41 Sup. Ct., 266,* whisky, seized by federal officers in a search of accused's home without a warrant, was held to be within the protection of the Fourth and Fifth Amendments.

The state courts have held, in well considered cases, that a search of personal property not contained in a house or building without a search warrant violates the section of the state Bill of Rights corresponding to the Fourth Amendment.

People v. Margelis, 217 Mich., 423; 186 N. W., 488.
People v. Foreman, 218 Mich., 591; 188 N. W., 375.
Blacksburg v. Beam, 104 S. C., 146; 88 S. E., 441.
Tillman v. State, 81 Fla., 558; 88 So., 377.
Pickett v. State, 99 Ga., 12; 25 S. E., 608.
Hoyer v. State, Wis., ...; 193 N. W., 89.
Butler v. State, 129 Miss., 778; 93 So., 3.
State v. Wills, 91 W. Va., 659; 114 S. E., 261.

In *People v. Foreman, 218 Mich., 591; 188 N. W., 375,* the defendant's grip was searched by an officer who had neither a warrant nor a search warrant. Liquor was found

therein and evidence of the finding was admitted over the defendant's objection. The conviction was reversed upon the ground that the constitutional guarantee against unreasonable searches and seizures had been violated.

In *State v. Wills, 91 W. Va., 659; 114 S. E., 261,* the defendant was arrested and searched without a warrant and liquor found on his person. The state claimed that the officer knew of the presence of the liquor from a third person who had sold it to the defendant. In holding the search in violation of constitutional rights it is said:

> "But we are told that the constitutional privilege under Section 5 is strictly limited to admission of the party, as a witness, and that that provision does not apply to incriminating articles taken from the accused illegally; that if the accused is required, as a witness, under judicial process, to produce the incriminating articles, it applies and he can claim his privilege; but if the state does not choose to act under the law and pursuant to the law, but wholly without the law, it may do so, it may forcibly and illegally seize them from the accused, either from his person or his home, and use them against him. Possibly that might be true, if it were not for Section 6, which prohibits unreasonable searches. That prohibition was meant, not for private persons, but for the state and all its officers. Searches and seizures made by private persons or officials acting in their private capacity or for private purposes, were always against law and needed no constitutional inhibition. We repeat that Section 6 was meant for the state. It makes it unlawful for anyone acting in an official capacity under governmental authority to make unreasonable searches and seizures. It does not prohibit all searches and seizures, but only those which are unreasonable. And what are unreasonable? Certainly all those searches and seizures that are unlawful. To search without a search warrant the person of one not charged with felony, nor committing an

offense within the presence of the officer which would authorize his arrest without a warrant, is an unlawful and therefore an unreasonable search; and to seize liquors, so found upon him, after such unlawful search, is an unlawful and therefore an unreasonable seizure."

In *Hoyer v. State, 193 N. W., 89,* a decision by the Wisconsin Supreme Court, decided in April, 1923, it appeared that an officer saw the car of defendant standing on the street after a collision. He claimed he "could smell something funny" and saw a package in the car. He examined the package and found it contained a bottle of liquor. The defendant asked the court to suppress this evidence. The trial court refused. In the Supreme Court the case was reversed and the search held to be in violation of defendant's constitutional rights. The court said, speaking through Mr. Justice Eschweiler:

> "Under their testimony the situation presented to these officers at the time they entered the automobile and took its contents was one which, at the most, might have justified the issuance of a search warrant by a magistrate. The granting of such a writ, however, is a matter for judicial determination and not within the much more limited field of the discretion vested in executive or administrative officers *(State v. Peterson, 27 Wyo., 185; 194 Pac., 342; 13 A. L. R., 1284),* and the many authorities in that case cited. The search and seizure in this case was, upon the facts presented, without sufficient warrant in law and therefore unlawful."

The court then proceeds to review the recent decisions of both the state and federal courts and stated that they deemed it proper not to send the case back for a new trial but to direct the discharge of the defendant.

In *Tillman v. State, 81 Fla., 558; 88 So., 377,* it was held that the attempt to seize a gallon can or jug from the de-

fendant, a negro, by the deputy sheriff, without a warrant or search warrant, was an unconstitutional seizure and justified the negro in resisting arrest and shooting at the officer.

Citation of similar cases might be multiplied. The cases illustrate the principle that a seizure without a search warrant is unreasonable when an arrest would not be justified without a warrant. The proposition that the evidence which is found justifies the arrest or the seizure is a specious argument and has found no support except in one or two illy considered district court cases. To use a homely phrase, it is an attempt to pull one's self up by his own bootstraps.

If the principles of finding justifying the search be a valid one, it means simply this, that an officer may stop and search every vehicle or foot passenger on the highway and if liquor is discovered the search would be legal. Such practice would, in the words of Mr. Justice Bradley in *Boyd v. United States, 116 U. S., 616; 6 Sup. Ct., 524, 533,* "suit the purpose of despotic power, but it cannot abide the pure atmosphere of political liberty and personal freedom."

Not only this, but according to the argument, searches of homes without search warrants would be legalized in case liquor was found. This is exactly contrary to the *Amos case* decided by this court.

In the well considered case of *United States v. Slusser, 270 Fed., 818 (D. C.),* the specious doctrine is disposed of by Judge Peck in very able manner:

> "An unlawful search cannot be justified by what is found. A search that is unlawful when it begins is not made lawful when it ends by the discovery and seizure of liquor. It was against such prying, on the chance of discovery, that the constitutional amendment was intended to protect the people."
>
> * * *

Section 26 of the National Prohibition Law provides:

> "When the commissioner, his assistants, inspectors, or any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle * * * and shall arrest any person in charge thereof." * * *

If the words "shall discover" refer to a discovery by lawful means, the statute adds nothing to the common law power of the enforcing officers. If on the other hand, it is so interpreted to give the officers the right to search any and all vehicles passing on the highway it is clearly in violation of the Fourth Amendment. If it be so construed it is a general warrant a thousand times more sweeping than those issued against Wilkes and his associates by Halifax. In the warrants issued by Lord Halifax, the parties were sometimes expressly mentioned by name and always designated as the publishers of certain matter.

> *Entick v. Carrington, 19 How. St. Tr., 1029.*
> *Leach v. Money, 19 How. St. Tr., 1001.*
> *Wilkes v. Wood, 19 How. St. Tr., 1153.*

It can hardly be conceived that in this country at this time a legislature could be presumed to have intended a drastic and obviously unconstitutional measure, far exceeding the very examples which led up to the adoption of the Fourth Amendment.

The situation is just this; the word "discover" may mean "finding out," "ascertaining" or "detecting." We submit that this is its natural meaning, and not to "examine," "explore" or some other mere action which may or may not result in disclosure. If the later definition is accepted we

have an Act of Congress which is in effect a legislative general warrant addressed to all officers to search all vehicles. That such a provision is unconstitutional is not open to question. In accordance with the general principles that a law must be so construed as to render it constitutional if possible, the former definition must be accepted. The former definition would give the officers no greater authority to search than was permitted at common law.

The right guaranteed to the people by the Fourth Amendment is to be secure in their persons and effects, including their automobiles, against unreasonable searches. Is the stopping and searching of an automobile on the public highway unreasonable? We submit that it is unreasonable unless the officers have a valid search warrant or are in possession of such knowledge as will be sufficient to make a legal arrest of the occupants. The search in the instant cause appears to be based on mere speculation or supposition and was therefore unreasonable, and in violation of the rights of plaintiffs in error under the Fourth Amendment to the United States Constitution.

IV. The Automobile and Liquor Seized Should Have Been Returned to Plaintiffs in Error and the Evidence Obtained Through the Seizure Suppressed.

A. Where Property or Evidence Has Been Obtained Through Unconstitutional Searches and Seizure, Failure to Return the Same and to Suppress the Evidence Learned Thereby Constitutes Reversible Error.

Boyd v. United States, 116 U. S., 616; 6 Sup. Ct., 524.

Weeks v. United States, 232 U. S., 383; 34 Sup. Ct., 341.

Silverthorne Lumber Company v. United States, 251 U. S., 385; 40 Sup. Ct., 182.

Gouled v. United States, 255 U. S., 298; 41 Sup. Ct., 261.

Amos v. United States, 255 U. S., 313; 41 Sup. Ct., 266.

Under the holding of *Adams v. United States, 192 U. S., 585; 24 Sup. Ct., 372,* it is necessary that the defendant should move before trial to have the things seized returned, thereby disposing of the collateral question before trial. In *Gouled v. United States,* it was held that failure to make the application before trial was excused when the seizure was made through stealth and the defendant first knew of the seizure when the evidence was offered.

In the instant cause prompt application by the plaintiffs in error was made for return of the articles, first to the United States Commissioner after their arrest, second to the trial court on the third day after the indictment, which application was renewed at the trial. The form of the application is precisely the same as used in the *Weeks case.* Compare pages 3-6 of the printed record with *34 Sup. Ct., 342.* The plaintiffs in error have been diligent in bringing

this matter to the attention of the trial court so that a collateral question at the trial will be avoided.

We are familiar with the cases in some of the state courts and with the statements of law writers, which criticise the holdings in the *Weeks* and other *cases*. Professor Wigmore is perhaps the leader in the criticism of the doctrine of this court. In the second edition of his work on *Evidence, Section 2184,* he advanced the argument that the unconstitutional search should only be grounds of a civil suit against the officer and that any evidence however obtained should be admitted. The futility of a civil action for damages against the officer as a means of protecting the constitutional rights of the accused is pointed out by Professor Chaffee in *35 Harvard Law Review, at page 695.* If Mr. Wigmore's proposition were followed, the innocent man would seldom bring a civil action and the guilty man would receive scant satisfaction at the hands of a jury. The Fourth Amendment would become practically a dead letter.

Mr. Wigmore's proposition might be justified if ours were a land without constitutional guarantees or if the privilege of the people against unreasonable searches and seizures were a mere common law or statutory principle. However this court has repeatedly said since the decision in the *Boyd case* that the constitutional guarantee against unreasonable searches and seizures will be protected to the extent of excluding the evidence illegally obtained provided the question is raised before trial. This is giving to the constitution its full effect. The question is no longer an open one in this court. In addition, the doctrine of the *Boyd* and *Weeks cases* has found support in many well considered recent cases in the state courts under the provisions of the Bills of Rights in the state Constitutions.

Callender v. State, ... Ind., ...; 136 N. E., 10.
State v. Rowley, ... Ia., ...; 187 N. W., 7.
Youman v. Commonwealth, 189 Ky., 152; 224 S. W., 860.

Ash v. Commonwealth, 193 Ky., 452; 236 S. W., 1032.
Helton v. Commonwealth, 195 Ky., 678; 243 S. W., 918.
Mattingly v. Commonwealth, ... Ky., ...; 250 S. W., 105.
People v. Marxhausen, 204 Mich., 559; 171 N. W., 557.
People v. DeLamater, 213 Mich., 167; 182 N. W., 57.
People v. LeVasseur, 213 Mich., 177; 182 N. W., 60.
People v. Vanderveen, 214 Mich., 21; 182 N. W., 61.
People v. Mayhew, 214 Mich., 153; 182 N. W., 676.
People v. Halveksz, 215 Mich., 136; 183 N. W., 752.
People v. Woodward, 215 Mich., 267; 183 N. W., 901.
People v. Margelis, 217 Mich., 423; 186 N. W., 488.
People v. Foreman, 218 Mich., 591; 188 N. W., 375.
People v. Dorrington, 221 Mich., 571; 191 N. W., 831.
People v. Musk, 221 Mich., 578; 192 N. W., 485.
People v. Hertz, ... Mich., ...; 193 N. W., 781.
Tucker v. State, 128 Miss., 211; 90 So., 845.
Butler v. State, 129 Miss., 778; 93 So., 3.
Blacksburg v. Beam, 104 S. C., 146; 88 S. E., 441.
State v. Gibbons, 118 Wash., 171; 203 Pac., 390.
State v. Wills, 91 W. Va., 659; 114 S. E., 261.
State v. Andrews, 91 W. Va., 720; 114 S. E., 257.
Hoyer v. State, ... Wis., ...; 193 N. W., 89.
State v. Jokosh, ... Wis., ...; 193 N. W., 976.
State v. Petersen, 27 Wyo., 185; 194 Pac., 342.

We cite these cases to show that the *Weeks* and other decisions of this court have been followed by the state courts. Most of the foregoing cases were ones in which illegally possessed liquor was obtained as a result of the unlawful search. Some of them, including the recent Michigan cases, involve prosecutions under state laws which have substantially the same provisions as the National Prohibition Act.

In Michigan, Section 31 of Act 336, Public Acts, 1921, provides:

> "No property right of any kind shall exist in any intoxicating liquors had, kept, transported or possessed contrary to law or in or to any receptacle or container of any kind whatever in which said liquors may be found and all such are hereby declared forfeited to the state and shall be seized." * * *

The above statute went into effect May 5, 1921, and hence the cases of *People v. Foreman* and *People v. Hertz, supra,* are decided under its provisions.

In addition, the following cases in the Circuit Courts of Appeals hold that in prosecutions for violation of the National Prohibition Enforcement Act, evidence of liquor obtained by unlawful searches and seizures is inadmissible.

Snyder v. United States, 285 Fed., 1 (C. C. A., 4th Cir.).
Murphy v. United States, 285 Fed., 801 (C. C. A., 7th Cir.).

The Circuit Court of Appeals for the second circuit has announced the same doctrine with reference to the possession of narcotics in violation of national law.

Ganci v. United States, 287 Fed., 60.

B. The Plaintiffs in Error Are Entitled to a Reversal of the Conviction and Return of the Car and Liquor Seized.

We believe that, under the cases cited in A *supra*, plaintiffs in error are entitled (1) to reversal of the conviction against them; (2) return of the automobile seized; (3) return of the liquor seized. However as these questions are somewhat different in their nature, we deem it advisable to examine further in detail and separately each of the three kinds of relief.

(1) The evidence should have been suppressed.

It can be readily seen that the liquor is important in two senses, first as evidence to secure the conviction of the plaintiffs in error and second as a subject of forfeiture. The fact that the liquor was the subject of forfeiture does not make it any more admissible in evidence than if the evidence were only of a documentary nature. This must be clear from the case of *Amos v. United States, 255 U. S., 313; 41 Sup. Ct., 266.* In that case the defendant was charged with removing whisky on which the government tax had not been paid, to a place other than a government warehouse and of selling whisky on which the tax required by law had not been paid. By examination of the revenue laws then in force it will be seen that the goods seized in the *Amos case* were subjects of forfeiture. See Revised Statutes of the United States, Sections 3450 to 3457, inclusive. Nevertheless this court held that the property should have been returned and the evidence suppressed because the arrest was made without a warrant to arrest defendant or to search his premises.

(2) The automobile should be returned.

It must be remembered that the automobile is not contraband. When lawfully seized, Section 26 of the National Prohibition Enforcement Act authorizes that it be sold by order of the court. When unlawfully seized, however, no right of forfeiture exists. In a well considered opinion in *United States v. Slusser, 270 Fed., 818,* District Judge Peck said, page 821:

> "Lastly, where there is no evidence to warrant the forfeiture of an automobile seized as the vehicle of unlawful transportation, except that obtained upon an unwarranted and unlawful search and seizure and so inadmissible, the automobile cannot be forfeited. There is in such case no competent evidence by which the government can prove its title. Under such circumstances the automobile would have to be returned."

That proceedings for forfeitures must be strictly complied with, requires no citation of authority.

Act of November 23, 1921, c. 134, Sec. 5 (42 Stat., 222, 223), provides:

> "All laws in regard to the manufacture and taxation of and traffic in intoxicating liquor, and all penalties for violations of such laws that were in force when the National Prohibition Act was enacted, shall be and continue in force, as to both beverage and non-beverage liquor, except such provisions of such laws as are directly in conflict with any provision of the National Prohibition Act or of this Act; but if any act is a violation of any of such laws and also of the National Prohibition Act or of this Act, a conviction for such act or offense under one shall be a bar to prosecution therefor under the other."

The date of the offense in the instant cause was December 15, 1921, and therefore after approval of the above act.

Section 26 of the National Prohibition Enforcement Act (41 Stat., 315), provides the method of forfeiture. In our opinion this excludes a method of forfeiture under Section 3450 of the Revised Statutes pertaining to Revenue Laws.

We are familiar with the decision of this court in *United States v. Statoff* (Jan. 2, 1923), *43 Sup. Ct., 197*, but we believe that as the seizure here was by prohibition agents enforcing the prohibition law, no forfeiture under the old revenue law is justified.

We submit moreover that whether the forfeiture provisions under the Revenue Law would be here applicable or not, the seizure here being unreasonable, and therefore unconstitutional, will not support forfeiture proceedings.

The Revenue Law (Revised Statutes, 3450 *et seq.)*, was in force at the time of the commission of the offense in the case of *Amos v. United States, 255 U. S., 313; 41 Sup. Ct. 266.* Nevertheless this court held that defendant was entitled to return even of the liquor itself. The forfeiture allowed by the Revenue Law is, if anything more strict than that permitted by Section 26 of the National Prohibition Enforcement Act for the latter requires a conviction of the defendant before sale of the vehicle. We submit that there was and could be no valid conviction of plaintiffs in error in the instant cause. Under the holding of this court in the *Amos case*, the automobile must be returned to the plaintiffs in error.

(3) The liquor should be returned.

Of the state cases which have followed the rulings of this court in the *Boyd, Weeks* and subsequent *cases*, the following have held specifically that liquor unreasonably seized should be returned.

Youman v. Commonwealth, 189 Ky., 152; 224 S. W., 860.

People v. Marxhausen, 204 Mich., 559; 171 N. W., 557.
People v. DeLamater, 213 Mich., 167; 182 N. W., 57.
State v. Andrews, 91 W. Va., 720; 114 S. E., 257.
State v. Petersen, 27 Wyo., 185; 194 Pac., 342.

Furthermore the same principle was followed in the case of *State v. Rowley, ... Ia., ...; 187 N. W., 7*, where illegal instruments were ordered to be returned where they were found as the result of an unreasonable search.

In the following cases under the National Prohibition Enforcement Act decided by the Federal Courts, it has been held that liquor unreasonably seized by officers must be returned.

United States v. Mitchell, 274 Fed., 128 (D. C. N. D., Calif.).
United States v. Armstrong, 275 Fed., 506 (D. C. E. D., Fla.).
United States v. Ray and Schultz, 275 Fed., 1004 (D. C. E. D., Mich.).
Queck v. Hawker, 282 Fed., 942 (D. C. W. D., Pa.).
United States v. Vigneaux, 288 Fed., 977 (D. C., Mass.).
United States v. Harnich, 289 Fed., 257 (D. C., Conn.).

In many of the cases in both the state and federal courts the right of the defendant to return of the liquor is not involved because not prayed for in the petition.

In *Amos v. United States, 255 U. S., 313; 41 Sup. Ct., 266*, the order of this court included provision for return of the liquor. It is true that in the *Amos case* there was no declaration by statute that there should be no property rights in liquor as here; still provisions in the Revenue Act declared that the liquor should be forfeited to the Federal Government.

While it may be said that plaintiffs in error could have no property rights in the liquor, still they did in fact have possession. That possession was taken from them by unlawful seizure. In order to protect to its fullest extent the constitutional rights to be secure against unreasonable searches and seizures, the court should put the plaintiffs in error back *in statu quo*. The government should gain nothing, the plaintiffs in error lose nothing, because of the unreasonable search. Complete constitutional rights cannot be observed unless not only the conviction is reversed but also the liquor as well as the automobile is returned to plaintiffs in error.

People v. Case, 220 Mich., 367; 190 N. W., 289, is a decision of the Michigan Supreme Court under a prohibition law substantially the same as the National Prohibition Enforcement Act. We do not agree with the decision of the majority of the court which held that under the circumstances of that case the search of an automobile truck, was reasonable. However, the case on its facts, is clearly distinguishable from the instant cause. There the officers looked into a large truck, standing unattended on a fair grounds and from what they saw and smelled concluded that there was liquor in the truck and searched it.

Mr. Justice Wiest delivered a dissenting opinion concurred in by Mr. Chief Justice Fellows and Mr. Justice Bird. The opinion is replete with learning and contains contributions to the historical and political questions involved in the subject of searches and seizures which we believe to be unexcelled even in the decisions in the *Boyd* and *Weeks cases*. The following passage is pertinent to the subject here under discussion and we believe it to be unanswerable:

> "But it is said that property to all liquor is in the state, and therefore it is contraband in the hands of any and all persons, and one cannot have possession thereof so as to fall within the security of the Bill of Rights. Such position is too broad, and contrary

to the provisions of the liquor law itself. If one may not have possession of liquor and be secure within the Bill of Rights, why does the liquor law, in express terms, forbid search and seizure thereof in a dwelling house? Such provision in the liquor law of the state constitutes no boon granted by the Legislature, but is in recognition of the security afforded by the Bill of Rights. So there can be possession of liquor beyond the power of search and seizure under the liquor law. It seems to be thought that, because liquor is declared contraband, and property therein declared to be in the state, one in possession thereof has no rights the officers are bound to respect. It seems to me that this position entirely overlooks the fact that no search warrant can issue in any case to deprive a man of his property, and therefore the only purpose of search warrants, and the only occasion upon which they can issue, is to seize articles unlawfully possessed.

It is idle to say that liquor is contraband, and for that reason cannot be possessed, for, if it was not contraband, and could be lawfully possessed then no warrant could issue for its seizure at all. At common law no power existed to make a search without a warrant. *State v. Welch, 79 Me., 99; 8 Atl., 348; In Re Swan, 150 U. S., 637; 14 Sup. Ct., 225; 37 L. Ed., 1207.* Declaring by statute that no property right exists in intoxicating liquors, and forfeiting such liquors to the state, and commanding officers to arrest any person in charge thereof, must not be read with the eyes shut to the provisions relative to search warrants. If officers, without a warrant, may search where they have suspicion, to whom shall they make a return of the result of the search? Such a roving commission opens the way to oppression and corruption, and rests the security of the individual citizen upon the will of petty officers."

CONCLUSION.

The argument that if contraband is found, evidence thereof is admissible even if the search is unreasonable, is akin to the argument that finding justifies the search and makes it reasonable. Both arguments are attempts to justify an unconstitutional act by the discovery of an unlawful act. This is opposed to the spirit and holding of the *Boyd, Weeks, Gouled* and *Amos cases.* It is further opposed to the twenty-seven well considered cases in the state courts cited in subdivision A of the fourth division of this brief. In almost all of these cases something unlawfully possessed, usually liquor, was unreasonably seized. Yet in accordance with the rule in the *Amos case,* it was held that the evidence should have been suppressed.

This court has held in the *Boyd case* that it would protect the constitutional rights of persons against unreasonable searches and seizures. This court has adhered to the principles and extended, rather than restricted in application in the recent cases. The granting of the relief asked by plaintiffs in error, viz: The reversal of their conviction and the return of the unreasonably seized automobile and liquor involves no material extension of the doctrines already announced by this court.

The Eighteenth Amendment cannot remove the guarantee of the Fourth Amendment against searches and seizures any more than it can take away the right of trial by jury in cases involving liquor violations.

The search was unreasonable. The convictions should be reversed.

Respectfully submitted,

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